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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-663

WILLIAM R. WESSON, a CLASS B STOCKHOLDER in MISSOURI PACIFIC RAILROAD COMPANY, for himself and all others similarly situated,

Appellant,

v.

BETTY LEVIN, on behalf of herself and all other holders of CLASS B COMMON STOCK of MISSOURI PACIFIC RAILROAD COMPANY, and on behalf of said corporation, and ROBERT LE VASSEUR and ALLEGHANY CORPORATION,

Plaintiffs-Appellees,

against

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS MILBANK,

Defendants-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William R. Wesson, a Class B stockholder in Missouri Pacific Railroad Company (Mo Pac), on behalf of himself and all others similarly situated, petitions this Honorable Court, pursuant to

its Rule 58(2) for a rehearing of his prior petition to this court for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, said prior petition having been dated October 17, 1973, and denied by this Court by an Order entered December 17, 1973.

Proceedings Below

The Plaintiffs-Appellees, as Class B stockholders of Mo Pac, on behalf of themselves and all other Class B stockholders similarly situated, maintained a class action under Rule 23(a), (b)(1) and (2), [Fed. Rules of Civil Proc.], in the United States Federal District Court (S. D. N. Y.), against the Defendants-Appellees, basing the jurisdiction of the Court on diversity of citizenship, (Title 28 U. S. C. 1332).

The thrust of the complaint below was directed toward the dividend policy with respect to the Class B stock, which the Plaintiffs-Appellees claimed was inadequate and too low.

The Class B stockholders owned the equity of Mo Pac, but represented only 2% of the voting stock. The Class A Stockholders were limited to only a $5 non-cumulative annual dividend when and if earned and declared, plus $100 per share on dissolution or liquidation, with no further participation in the equity of Mo Pac. Class A stockholders controlled 98% of the voting stock, and had the power to elect Mo Pac's Board of Directors and determine dividend policy with respect to the equity owners —Class B stockholders. In essence the Class B stockholders were the common stock equity owners, and the Class A stockholders were in reality non-cumulative preferred stockholders with voting control. [Reorganization Plan of Mo Pac effective March 1, 1956; Missouri Pac. R. R. Reorganization 290 I. C. C. 477 (1954), approved in In Re Missouri Pac. R. R., 129 F. Supp. 392 (E. D. Mo.), aff'd sub nom. *Missouri Pac. R. R. 5¼% S. B. C.* v. *Thompson,* 225 F. 2d 761 (8th Cir. 1955), cert. denied 350 U. S. 959 (1956).]

The defendants-appellees includes, in addition to Mo Pac and its directors, Mississippi River Corporation which in 1973

owned 63% of the voting Class A stock, and was alleged below to have misused its majority voting stock to starve the Class B stockholders, and to deprive them unjustly of proper dividends on their equity holdings.

Four years after the action below for better dividends was declared a Class action, the plaintiffs-appellees entered into a stipulation of settlement with the defendants-appellees, which settlement had nothing to do with the claim for dividends, but called for a total recapitalization of Mo Pac., something far removed from and foreign to the pleadings in the pending litigation below. The plaintiffs-appellees by this settlement abandoned their original claim or cause of action for better dividends, which was held as a trust for the petitioner and other Class B stockholders purportedly represented by the plaintiffs-appellees.

But far worse than abandonment of the class cause of action the settlement required that the represented class of Class B stockholders give up their ownership of their Class B stock, reduce their equity in Mo Pac's assets as of December 31, 1972 from 65.5% to 25.5% and transfer it to the Class A stockholders so that the latter's equity might be increased from 34.5% to 74.5%, and to accept under the recapitalization plan $850 and 16 shares of new common with stated value of $6.25 per share for each share of Class B stock, without any right to have the said stock evaluated under proceedings of due process for its actual value. All of this 61% loss of equity as of December 31, 1972 was given up by the plaintiffs-appellees, and the burden was placed on the petitioner and other represented Class B stockholders with absolutely no counterclaim or pretext of a counterclaim on the part of the defendants-appellees that they had a right to such benefits or right to recapitalization.

On May 2, 1973, the Federal District Court (S. D. N. Y.) by judgment, over the protest of the petitioner, and having denied the motion of petitioner on behalf of himself and others similarly situated that he not be bound by the said settlement, approved the said stipulation of settlement.

The United States Court of Appeals (2nd Circuit), approved the judgment of the District Court, without opinion but upon the opinion of the District Court.

Controlling Intervening Factors Which Warrant Rehearing

Aside from the dire need for clarification and guide lines as to the application of Rule 23e, (F. R. C. P., as to Compromise of a Class Action), so as to insure that the settlement of a non-true class suit has some fair and reasonable relation to the pleadings and issues in litigation, and does not compel the represented members to give up property rights which are not involved in the litigation, petitioner advances three reasons why this Honorable Court should rehear his prior petition for Certiorari.

FIRST: In the recent decision of this Court in *Zahn et al* v. *International Paper Company*, Cert. 72-888, argued October 16, 1973, decided December 17, 1973, it was established that each member of a class action, formerly known as spurious, the jurisdiction of which is based on diversity of citizenship, must have a claim meeting the jurisdictional amount of $10,000, (Title 28 U. S. C. 1332) exclusive of costs and interest.[1]

In the instant case, which was a suit the thrust of which was for better dividends, 76.1% of the Class B stockholders who were represented by the plaintiffs appellees owned 10 or less shares of Class B Mo Pac stock. By no stretch of the imagination could these represented stockholders meet the jurisdictional amount, and hence the District Court had no authority to enter judgment affecting their property rights in ther stock. This is so

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[1] This is a spurious class action because the right of the various Class B stockholders in the controversy was not joint but several. Moreover, many, if not most, of the Class B stockholders bought their stock for capital appreciation rather than cash dividends; otherwise they would not have paid from $700 to $2,500 per share for a stock paying a $5 per annum dividend. Clients of the appellant, Mr. Wesson, a stock and bond broker, and Mr. Wesson himself bought the Class B stock for capital appreciation because of its large earning power and because the 1956 Reorganization Agreed Plan made the Class B stock "The residuary beneficiary of any future prosperity the property may enjoy." 290 ICC 477 at 625. Finance Docket No. 9918. The Class B stock earned approximately $448 in 1972, using ICC accounting rules and after the maximum $5 per share dividend paid to Class A. The 1973 earnings are running substantially higher than 1972.

aside from the fact that these property rights were not in jeopardy in the litigation below and not within the jurisdiction of the District Court in any event.

A review of the Class B stockholders list of Mo Pac, at or about the time of the judgment below, reveals the following about the 922 Class B stockholders as of May 1, 1973:[2]

No. of Class B Shares Owned	Approx. No. of Class B Stockholder Owners	Percentage of Total Class B Stockholders
1 share	197	21.4%
2 shares	113	12.25%
3 shares	64	6.93%
4 shares	18	1.95%
4 or less	392	42.5%
5 or less	558	60.5%
10 or less	701	76.1%

The dividend being paid to the Class B stockholders at the time of the suit was $5 per share per year. The complaints of the plaintiffs-appellees were not clear as to how much the dividends should be, but it would unduly stretch the imagination to pretend that a holder of 5 or less shares of Mo Pac Class B stock had $10,000 involved in the controversy.

The Zahn case, (supra), coming from the 2nd Circuit, should have controlled, and the judgment of the District Court could not and should not be binding on the Class B stockholders who lacked the jurisdictional amount of $10,000.00. Because this honorable court held in Zahn that such an amount was jurisdictional and not procedural, it logically should make no difference whatsoever that the class in Zahn was pursuant to Rule 23(b)(3), (F. R. C. P.), and the class in the instant case was pursuant to Rule 23(a)(b)(1) and (2) (F. R. C. P.). In both cases the rights of the members of the class were several and not joint.

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[2] When Hon. Judge VAN PELT BRYAN issued his class action order on October 9, 1968, there were "approximately 1,200 holders of Class B;" and Alleghany Corporation was beneficial owner of 20,732 Class B shares of the total 39,731 Class B shares outstanding.

SECOND: Alleghany Corporation, the holder of 53% of Class B Mo Pac stock purported to "fairly and adequately protect the interests of the class" of Class B stockholders of which petitioner is one. (Rule 23(a)(4) F. R. C. P.).

However unknown to the petitioner, until recently through the ICC hearings on the instant recapitalization of Mo Pac as approved by the Courts below, Alleghany had been previously authorized by the ICC to acquire the Jones Motor Co. Inc. [Alleghany Corporation Control and Purchase—Jones Motor Co., Inc.—and Control Erie Trucking Company No. MC-F-10444, 109 MCC 333, decided January 27, 1970; cf. Inadequacies of Protection for Investors in Penn Central and Other ICC-Regulated Companies—Staff Study for the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce, H. R. 92nd Congress, July 1971 Staggers Committee, Gov't Print. O. 59-2970 pages 36-38].

This acquisition of Jones by Alleghany was commenced as early as September 4, 1968 and was consummated by April 30, 1970.

The ICC in its decision of January 27, 1970 conditioned its approval of the Jones acquisition by Alleghany so that "the trustee-ship of Alleghany's Mo Pac securities as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission". (109 MCC 333, 350).

On October 6, 1973 Alleghany, through its attorney, filed a brief with the ICC seeking the ICC's approval of the recapitalization of Mo Pac as provided for in the settlement agreement of the judgment of the court below in the instant case. Alleghany argues in that brief that the divestiture of its (Alleghany's) interest in Mo Pac Class B stock would be in keeping with the public interest, the prior order of the ICC, (Jones Motor Co. Inc., supra 109 MCC 333), would save Alleghany from great financial injury, and relieve the ICC of the burden of supervision of the trust of Alleghany's Mo Pac stock.

From the above, two things are clear: (1) that Alleghany, contrary to its position as a class representative, had such an

over-riding self interest in divesting itself of its Class B stock by the recapitalization plan, that it could not and did not fairly represent the rights of the petitioner and others similarly situated as required by Rule 23(a)(4) (F. R. C. P.).

(2) That Alleghany was not the real party in interest to enter into the stipulation of settlement calling for the recapitalization of Mo Pac because Alleghany's Class B Mo Pac stock was at that very time in trust under "the continuing jurisdiction of the Commission" (ICC) (109 MCC 333, 350 Jones Motor Co. supra). At the very least the prior approval of the ICC should have been obtained before Alleghany signed the stipulation of settlement and/or the District Court rendered judgment approving it. The settlement of the case below went beyond the claim for dividends, (in fact abandoned that claim), and called for recapitalization of an interstate railroad, Mo Pac, something of special concern to the ICC, and because of such concern Alleghany's Mo Pac stock was at that time under the continuing jurisdiction of the ICC.

From the opinion of the District Court below it is clear that the court was unaware that Alleghany's self-interest in disposing of its Class B stock was paramount, and was not representative or beneficial to petitioner and other Class B stockholders. The District Court stated: "Alleghany's self-interest as the owner of 53% of the Class B stock gives some assurance that it negotiated to obtain the best possible terms for that group vis-a-vis the Class A stockholders". "If the objectors evaluation of $4,000 or more per share is sound, then Alleghany, owning in excess of 21,000 shares, has after many years of litigation, suddenly given up the ghost and yielded more than $40,000,000—hardly a likelihood in view of the history of events and the sophistication of its financial executives and advisers" (Pages A21 and A29 respectively from appendix of petitioner's original petition for Certiorari October 17, 1973, Cert. 73-663).

A reading of the Staggers Committee Report (supra), the ICC record on the Jones acquisition by Alleghany (supra) plus Alleghany's filed brief with the ICC in October 1973, would reveal why Alleghany did give up the ghost and was anxious to

dispose of its Class B Mo Pac stock in bulk at any price. Essentially it had to do with substantial tax benefits to be derived for Alleghany by avoiding a 70 percent penalty tax if it were firmly considered a motor carrier under the jurisdiction of the Interstate Commerce Commission, rather than an investment corporation under the jurisdiction of the Securities Exchange Commission. In spite of this fact Alleghany still controls Investors Diversified Services which is now the largest mutual fund complex in the United States with assets in excess of $6 billion.[3][4] For the tax benefit interest of Alleghany, the rights of the petitioner and Class B stockholders, supposedly represented by Alleghany, had to be sacrificed.

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[3] One of the primary reasons presented by Alleghany for acquisition of the operating rights of Jones is to lessen its tax burden. Such burden arises from the fact that Allan P. Kirby, as of February 28, 1969, was the beneficial owner of 4,084,813 shares, or 56.21 percent of the outstanding common stock of Alleghany. Alleghany is, therefore, for Federal income tax purposes, considered a personal holding company since one person (less than 5 individuals) owns more than 50 percent of its stock and has "personal holding income," (60 percent or more of adjusted gross income consists of dividends and interest) and is therefore subject to a 70-percent penalty tax on the "undistributed personal holding income." Alleghany does not want to distribute all such income to avoid the tax. With Alleghany the recipient of the operating revenue generated by its Jones Motor Division, it alleges it would be an operating company rather than a holding company for Federal tax purposes. It could then retain and reinvest net earnings and would not be subject to the 70-percent penalty tax. (109 MCC 333, 339)

[4] CHAIRMAN STAFFORD, dissenting: Clearly, Alleghany violated section 5(4) of the act in acquiring the outstanding stock of Jones and Erie without prior Commission approval. While I agree with the majority finding that such a violation will not automatically defeat the transaction, I find nothing in the record to show that overriding public interest warrants its approval. Alleghany's primary purpose in acquiring Jones, and its affiliates, is to lessen its tax burden. The fact that funds conserved by approval of the transaction will be made available for carrier investment by Jones and thus benefit the public indirectly is not what I consider to be of overriding public interest. Jones is a viable, financially sound and well managed corporation and I feel certain that it could continue to adequately serve the public in the future as it has in the past without benefit of Alleghany's tax savings. (109 MCC 333, 356-7)

THIRD: A fair reasonable and legal solution does exist, as proposed by the petitioner below, which would allow Alleghany to dispose of its B stock in bulk at $2,450 per share and leave petitioner and others similarly situated undisturbed in their equity ownership of MO PAC. Alleghany should sell all of its B stock to MO PAC at $2,450.00 per share, which shares would become treasury stock. The Class B stock should be split 20 for 1, leaving the A stock alone giving Mississippi 51.8% voting control and the minority shareholders of the Class A and B Common 48.2% voting control.

This solution is ideal in that it allows for the accomplishment of the legitimate goals of the corporate parties without abusing the property rights of petitioner and other small investors.

The rejection of this proposed solution results in the wrongful taking of other peoples' property for nothing; [B stockholder's equity in MO PAC is reduced from 65.5% to 25.5% under the judgment appealed from]. The question could be raised: was this the intent from the very beginning of the suit below as a class action?

This Case is a Worthy Case for the Courts Consideration

This honorable court has done much to interpret Rule 23 (FRCP) so that large corporate defendants would not be unfairly and unjustly hounded by Class suits.

In the instant case the class suit device has been used to corral innocent and small investors into a box canyon, in order to tie them down by a court judgment. The abuse in this case is that a class suit on several rights, with no Class B interveners permitted after December 20, 1968, started for better dividends, suddenly is switched into a stipulation for recapitalization. The stockholders rights in their stock, which rights were never in jeopardy from the litigation, are now taken away for the benefit of the large corporate stockholder when the Court renders judgment approving the stipulation of recapitalization, as it did so do.

No small investor will be safe if this Court fails to take this case and pronounce some fair and just guidelines as to the proper relationship between the compromise of a class suit and the issues in the litigation.

Conclusion

Petitioner respectfully prays that this Court rehear his petition for a Writ of Certiorari on the following grounds: (1) That by virtue of this Court's recent opinion in *Zahn et al* v. *International Paper Co.* (No. 72-888, argued October 16, 1973, decided December 17, 1973), it is clear that the judgment below could not bind Class B stockholders of Mo Pac whose represented claims did not meet the jurisdictional amount of $10,000.00 exclusive of costs and interests;

(2) That, by recently discovered information Alleghany could not be a proper class representative to stipulate for recapitalization of Mo Pac because, (a) it had a self serving over-riding interest incompatible to the interests of petitioner and others similarly situated, and (b) its stock interests in Mo Pac were under the continuing jurisdiction of the ICC and the ICC was not a party to, nor did it appear in the action below;

(3) That the so called settlement by recapitalization, being so far removed from the issues involved in the original litigation for better dividends, caused the court to lose its adjudicatory power and to make the judgment void; and

(4) That there is a practical reasonable fair solution to the conflicting interests of the parties in this case, which solution avoids the abuse of Rule 23 and avoids the taking of small investors property by big corporations. [Description of the Plan supra p. 9.]

Dated: Brooklyn, N. Y.
January 9th, 1974

Respectfully submitted,

GERARD M. CAREY
Counsel for Petitioner

WILLIAM R. WESSON
Petitioner

Certificate of Counsel

I certify that the within Petition for Rehearing is presented in good faith and not for delay.

Gerard M. Carey
Counsel for Petitioner

Dated: Brooklyn, N. Y.
January 9th, 1974

Certificate of Service

I, GERARD M. CAREY, Counsel to Petitioner, do hereby certify that 3 copies each of the above and foregoing Petition for Rehearing has been deposited in the United States Mail, postage prepaid, on this the 10th day of January, 1974, to the following addressees:

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